

EXHIBIT 1

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-99000-smb

4 Adv. Case No. 09-01182-smb

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6 In the Matter of:

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8 BERNARD L. MADOFF INVESTMENT SECURITIES LLC,

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10 Debtor.

11 - - - - - x

12 IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF

13 BERNARD L. MADOFF INVESTMENT SECURITIES LLC,

14 Plaintiff,

15 v.

16 MERKIN ET AL.,

17 Defendants.

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1 U.S. Bankruptcy Court
2 One Bowling Green
3 New York, NY 10004
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5 August 9, 2017
6 10:01 AM
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21 B E F O R E :

22 HON STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE
24

25 ECRO: JULIO PESEYRA

1 Hearing re: Trustee's Motion to Exclude the Opinions and
2 Testimony of Jeffrey M. Weingarten

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4 Hearing re: Defendants' Motion to Exclude the Testimony and
5 Report of Bruce G. Dubinsky

6
7 Hearing re: Defendants' Motion to Exclude the Testimony,
8 Reports, and Declaration of Steve Pomerantz

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10 Hearing re: Defendants' Motion to Exclude the Expert
11 Testimony of Amy B. Hirsch

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13 Hearing re: Defendants' Motion to Exclude the Expert
14 Testimony of Lisa M. Col

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25 Transcribed by: Sonya Ledanski Hyde

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1 performing or not performing due -- adequate due diligence
2 or what adequate due diligence is. And I just don't see
3 that as an issue in the case.

4 MR. LEVANDER: So, Your Honor --

5 THE COURT: And let me explain why. I mean, Mr.
6 Merkin -- the issue in the case is not whether Mr. Merkin
7 adequately performed due diligence or was negligent in
8 performing due diligence or breached a fiduciary duty to
9 someone else in performing due diligence. It's what he
10 knew. If he did nothing, like the good faith purchasers in
11 these cases -- if he did nothing and didn't find out
12 anything, it just seems to me that's the end of the case.

13 MR. LEVANDER: Your Honor, I don't disagree.

14 THE COURT: Well, you put in a due diligence
15 report also.

16 MR. LEVANDER: I did. And I'll explain to you why
17 one could draw a distinction between the two. I could also
18 understand Your Honor saying that under Rule 702 you're not
19 going to find what I'm about to say as assisting the Court
20 in making the decision. But the fundamental, basic truth is
21 that Mr. Pomerantz's report is relevant to nothing. Willful
22 blindness is the standard and Your Honor articulated the
23 issue.

24 THE COURT: So, what's Mr. Weingarten's relevant
25 --

1 MR. LEVANDER: So, I do think -- so, unlike Mr.
2 Pomerantz who kind of dreamt up, you know, after the fact,
3 the tests that he had performed prior to Madoff's fall, Mr.
4 Weingarten does focus on -- based on 40 years of experience
5 including running Goldman Sachs Asset Management and his own
6 hedge fund, and having done due diligence a gazillion times
7 and having due diligence done on him a gazillion times, that
8 what -- he ties his analysis to what actually Mr. Merkin
9 did. And to the extent he says that is consistent with his
10 40 years of experience and what people did prior to the
11 emergence of the Madoff fraud, that does bear, arguably, on
12 the good faith of Mr. Merkin, which, you know, ties into the
13 willful blindness standard.

14 And so, therefore I could draw that distinction.
15 There's no relevance to the Pomerantz report. I'm going to
16 live with, you know, the goose and the gander here, though I
17 do think there is a difference between the goose and the
18 gander.

19 THE COURT: All right. I'll deal with Pomerantz's
20 motion first.

21 MR. LEVANDER: Okay. I'm not sure how much more I
22 need to say, but I'll quickly try to -- you know, we had
23 moved to exclude the report and testimony of --

24 THE COURT: All right. Going back to Weingarten -
25 -

1 MR. LEVANDER: Yeah.

2 THE COURT: -- why do I need Weingarten to tell me
3 what Merkin did? Merkin can testify to what he did, right?

4 MR. LEVANDER: Absolutely. And --

5 THE COURT: So, what do I -- what does Weingarten
6 do for it?

7 MR. LEVANDER: So, arguably Mr. --

8 THE COURT: Other than tell me what Merkin knew or
9 didn't know, which I wouldn't let him testify to anyway.

10 MR. LEVANDER: -- no, but what he would testify to
11 and his report identified is, "Here's the methodology that
12 in pre-Madoff days, people need to focus on the five P's.
13 This is the methodology that people did due diligence. And
14 based on my 40 years of experience and having done this a
15 lot, I've looked at what Mr. Merkin said he did. I've
16 looked at what was in Mr. Merkin's due diligence file, and I
17 find that satisfies what would have been normal due
18 diligence standards in that period of time."

19 THE COURT: Yeah. But his report goes well beyond
20 that. He talks about what Merkin knew or didn't know.

21 MR. LEVANDER: Well, he's tying -- what he's
22 trying to do is to tie the five P analysis to what Merkin
23 has testified to. His testimony relies on the accuracy of
24 Mr. Merkin's testimony and if the Court were to do this
25 probably then obviously the opinion becomes less useful.

1 But to the extent that the Court accepts Mr. Merkin's
2 testimony, accepts the inferences to be drawn from the due
3 diligence file, what Mr. Weingarten does is he adds the
4 gloss that this obviously is the kind of thing that one did
5 in those days on due diligence and therefore it shows that
6 Mr. Merkin was acting in good faith.

7 THE COURT: I think you got more out of his report
8 than I did.

9 MR. LEVANDER: I'm sure I --

10 THE COURT: I guess we're discussing Mr.
11 Weingarten's report at this point, but --

12 MR. LEVANDER: -- okay. I'm happy to discuss
13 either, Your Honor.

14 THE COURT: All right. Well, you made the motion
15 for Pomerantz so I'll hear Pomerantz.

16 MR. LEVANDER: Thank you, Your Honor. As much fun
17 as it would be to cross-examine Mr. Pomerantz and his
18 notions, I just think it's a waste of the Court's time and
19 it will be days of Court's time by the time we're finished
20 with all the motions you're going to hear today. The only
21 issue here is the issue of willful blindness. As you have
22 held, as Judge Rakoff has repeatedly held in the Madoff case
23 including your summary judgment decision, willful blindness
24 requires proof that Merkin subjectively believed there was a
25 high probability that Madoff was engaged in a Ponzi scheme

1 Your initial instincts are correct. It's
2 irrelevant. And that's what Judge Rakoff held in the Katz
3 case.

4 THE COURT: Okay. Thank you. I'll reserve
5 decision on Pomerantz. Who's next?

6 MR. LEVANDER: You want to hear from Weingarten --
7 on Weingarten as well?

8 THE COURT: Sure. What do we do on Weingarten? I
9 have many of the same comments. And frankly, I didn't find
10 your six-page report particularly probative. Go ahead. Did
11 I just make your argument?

12 MS. HOANG: Okay. Again, for the court reporter,
13 Lan Hoang, Your Honor. (Indiscernible) requires that each
14 expert that's proffered by a party -- the expert's opinions
15 be grounded in reliable principles and methodology analyses.
16 The Trustee submits that Mr. Weingarten should be excluded
17 because he hasn't done any -- he hasn't espoused any
18 principles, any methodologies, or any analyses in his six-
19 page report or even the -- what's repeated in his five-page
20 rebuttal report. It's the same concepts. And there's the
21 statement by Mr. Levander that yes, Mr. Weingarten has this
22 40 years of experience and he did all these things. Well,
23 yes, an expert could be qualified based on their experience.
24 But there still needs to be a bridge between that experience
25 and the bare conclusions that are contained in Mr.

1 Weingarten's expert opinions. And that bridge is whether
2 he's utilized reliable methodologies and analysis. And I
3 submit he has not.

4 And so, what the defendants have argued is to say,
5 "Oh, yes, he has a methodology. It's called the five P's."
6 Well, the five P's is not a methodology. The five P's is a
7 framework for doing due diligence. And what it is, is the
8 how of how you organize what you do. The methodology is the
9 actual collection of the data, what you do with that data
10 and what analysis you perform on the data and what that data
11 reveals, the how do I look at it part of due diligence.

12 So, just if you'll indulge me for a second, I
13 don't want to be over-simplistic with a real-world analogy,
14 but I think it's helpful in understanding the difference
15 between the five P's framework and the methodology. When
16 you buy a house, you have a home inspection because you
17 simply just don't rely on what the seller tells you is good
18 and bad about the house. The home inspector comes in and he
19 has a checklist of things he has to look at, the electrical,
20 the plumbing, the roof, the basement. That's the framework.
21 That's what he -- that's what do I look at.

22 So, from there, then he goes, for example, takes
23 the electrical. He goes and looks at the electric box and
24 he wants to determine is that electrical box a fire hazard.
25 Are there enough breakers in there for the entire house?

1 And he goes through the whole house and does analysis. What
2 appliances are in the kitchen. What is in the living room.
3 What's in each of the bedrooms? What's being utilized? And
4 then he does an analysis of whether there's enough breakers
5 in that box, and he comes to a conclusion.

6 That's the methodology. That's the analysis. The
7 same goes for the basement. And he'll do the same thing.
8 He looks at the basement because that's in the framework,
9 but he does independent analysis. Does the basement flood?
10 Do I need sump pumps? Do I have enough sump pumps for the
11 amount of water I see in there? And each of those analyses,
12 that's what we're talking about methodology and reliable
13 analysis.

14 So, again, I bring you back to Mr. Weingarten's --
15 the opinions set forth in his report and even in his
16 rebuttal report. They're conclusions. The report consists
17 of a summary of conclusions and a conclusion. There's no
18 analysis.

19 So, what are his opinions? He said, "It is clear
20 that the made-up philosophy would be to forego potential
21 higher profits in order to avoid a risk of loss." This is
22 at page 3. My apologies, Your Honor. "For example, being
23 out of the market around highly volatile periods during
24 which the options would have -- the options expired would be
25 part of that philosophy."

1 So, let's ask. It's not in there. How did he
2 determine that being out of the market around highly
3 volatile periods during which options expire? At his
4 deposition, Mr. Weingarten admitted that he looked at two,
5 maybe three trades and that they were some time in 2004,
6 maybe 2006, and that he doesn't recall exactly. He may have
7 written it down but he doesn't have the notes.

8 So, he looks at two or three trades over the 18-
9 year investment history of the Merkin funds with BLMIS.
10 There were 60,000 trades over that period of time. And so,
11 without identification of those two or three trades, we
12 can't, and the Court can't, assess how reliable his
13 methodology is, how reliable his analysis is, in order to
14 say to accept or reject his conclusion.

15 The same can be said for page 3 and 4 and he's
16 talking about the investment philosophy, the -- that Madoff
17 was utilizing the split-strike conversion strategy but with
18 added benefits. Mr. Merkin understood that Mr. Madoff had,
19 by virtue of his long experience and knowledge and ability
20 to take advantage of both market timing and stock selection
21 to improve returns over that which would have been generated
22 by formulae putting on of the trades.

23 What Mr. Merkin understood is something for Mr.
24 Merkin to testify to. But how did Mr. Merkin determine the
25 rest about market timing and stock selection? We don't

1 know. He -- there's no methodology. He just says so. So,
2 there's no bridge between what his experience is, because he
3 says, "I've seen it," to what his conclusion is that Madoff
4 was utilizing market timing and stock selection. So, you
5 have to take his word for it.

6 That's ipse dixits. That's not admissible as
7 expert -- as a basis for expert testimony under 702.
8 Another example, page 4 when he's talking about the
9 performance of the typical split-strike strategy. And when
10 the market was down, the fund outperformed the overall
11 market. When the market was up sharply, the fund
12 underperformed.

13 Well, what analysis did he do on BLMIS vis-à-vis
14 the market? What periods of time did he review. What were
15 the returns of BLMIS during those periods? What was the
16 market doing during those periods? Can he tell from the two
17 or three trades that he looked at, sometime in 2004,
18 sometime -- maybe 2006, over the 18-year history of the
19 investment?

20 There's other conclusions that he puts forth
21 within his report. Page 5, over the course of my career.
22 He talks about the Sharpe ratio, that the oft-referred to
23 Sharpe ratio was relatively high for Madoff, but I counted
24 many funds with very high Sharpe ratios. Madoff's results
25 were above IRTS but they were certainly achievable. Well,

1 what did you look at? What other funds? What were their
2 Sharpe ratios? What --

3 THE COURT: Well, you took his deposition. Did
4 you ask him any of these questions?

5 MS. HOANG: That -- I need to know based on what's
6 in his expert opinions. It's not our obligation to expand
7 on it because he didn't put it in there. The same applies
8 for -- let me backtrack and just add there that Mr. Merkin -
9 - there's no evidence that Mr. Merkin performed an analysis
10 of the Sharpe ratio. So, if you're trying to draw this back
11 to what Mr. Merkin did or didn't do and what he did was
12 proper, he didn't do it.

13 So, then we talk about the plausibility rule. And
14 it says, "Well, this was plausible. The returns were
15 plausible. It's the smell test." That's what he -- that's
16 what it is. Well, where -- if it's the smell test, how do
17 you know that his returns were plausible? Did you do
18 performance attribution? Did he look at it and determine
19 whether the performance of the BLMIS returns were consistent
20 with the split-strike strategy, were consistent with the
21 split-strike strategy with market timing, with stock
22 selection? He didn't do it. There's -- it's not in his
23 opinions. It's not -- he looked at two or three trades.
24 That's it.

25 So, we're not challenging Mr. Weingarten's

1 conclusions because he has his -- he has on this motion to
2 exclude his testimony. We're saying, yeah, those are his
3 conclusions. We're challenging him and moving to exclude
4 him because he hasn't performed -- he hasn't set forth, and
5 I submit he hasn't performed any methodology or any analysis
6 to the Merkin Fund's BLMIS returns, trade conference or
7 statements, whatever information that was available
8 contemporaneously to Mr. Merkin and the defendants
9 throughout their 18-year investment.

10 Had he done that analysis standing here, we
11 wouldn't have made this motion, because then, as Your Honor
12 has said, we would have been left to cross-examine him on
13 the issues of his credibility. But he hasn't met the
14 threshold for the submission of expert testimony. What's --
15 so what's left of his opinion if you take out everything
16 that he opines to on the market and what happens in the
17 Merkin and the Madoff investment, take those out. What's he
18 left -- he's left with statements regarding what Mr. Merkin
19 believed and what he felt. And we set that forth in the
20 papers. That's state of mind. That's not for him to
21 expound on.

22 The rest is a factual narrative. He's just
23 providing fact. He's not saying -- providing anything other
24 than -- he's not providing first-hand testimony. He's not
25 anxious to be a witness. And to the extent that he refers

1 to the OIG, the particular individual from the SEC or what
2 other saw or what other saw or what other funds did in the
3 industry, that's not relevant as to what Mr. Merkin saw.
4 This is subjective. Your Honor said the first prong is
5 subjective.

6 And I think with the experts, there -- and
7 particularly on the bench trial, the Court seems to be
8 inclined based on the motions in limine we argued last time
9 to just let it in. And I, as the fact-finder, can make
10 those determinations. And we don't dispute. We agree with
11 you that you could. But the parties here have had seven
12 years of discovery. They -- and expert discovery. We've --
13 we're on the 15th, 16th, or 17th case management plan. It's
14 been extended so the parties can complete expert discovery.
15 There have been no complaints that either party could not
16 get -- could not or did not have a fair and ample
17 opportunity to prepare their expert reports or to work with
18 their expert.

19 So, now it's for the Court to determine in advance
20 of trial whether Mr. Weingarten and each of the experts has
21 met the requirements of Rule 702 and Daubert, whether there
22 is a reliable, verifiable methodology and analysis. And
23 regardless of the fact that this is a bench trial, this Court
24 is empowered to act as a gatekeeper.

25 I trust -- if you'd give me just one more minute,

1 Your Honor, in -- recently in State of New York v. United
2 Parcel Service, Judge Katherine Forrest in a bench trial --
3 it's at 2016 Westlaw 4735368. It's a September 2016
4 opinion. Judge Forrest in a bench trial considered the
5 parties' respective motions to strike all the experts. The
6 plaintiff's experts were excluded, not only because he
7 lacked qualification but also because he failed to identify
8 a reliable methodology, failed to clarify a time period
9 during -- relevant to his analysis, and failed to identify
10 the data that he analyzed to come to his conclusion.

11 In her opinion in excluding that expert testimony
12 and preventing the other to go forward, the -- Judge Forrest
13 said, "The Court's experience as a gatekeeper in this regard
14 does not, however, mean that the fact a matter may be
15 charged to the bench signals a free-for-all use of the
16 expert witnesses. There's an obvious efficiency gains --
17 there are obvious efficiency gains in precluding testimony
18 from an individual unqualified to take the stand or one who
19 is providing testimony that is plainly irrelevant or is
20 based -- or, if relevant, is based on unreliable methods.
21 Such testimony is a waste of everyone's time. But the
22 efficiency is not the sole reason for the Court to make a
23 pre-trial decision on Daubert motions.

24 "Pre-trial rulings can enhance fairness as well as
25 efficiency in forming sensible trial adjustments. Pre-trial

1 (indiscernible) are to assess the risk-reward profile of the
2 case on a real-time basis. If a Court will preclude an
3 expert, it is generally better to sooner than later, simply
4 putting fair warning on the value."

5 And I would submit that, in opposite to Dr.
6 Pomerantz, Mr. Weingarten has not met the requirements of
7 Rule 702 and he should be exclude from trial.

8 THE COURT: Thank you.

9 MR. LEVANDER: What Mr. Weingarten has testified
10 to is that in this period of time, methodology of doing due
11 diligence was the (indiscernible) piece. A --

12 THE COURT: Well, that's what the goals or the
13 (indiscernible) that you looked into. But the argument is
14 he didn't say what he did in order to look into it.

15 MR. LEVANDER: No. So, what he did then was --
16 and Mr. Pomerantz doesn't disagree that that's the
17 appropriate standard, the five P's, and that he, Mr.
18 Pomerantz, did it that way himself. And what he said, based
19 on his 40 years of experience and hundreds of due diligence
20 examinations, either as the subject of it or doing it, that
21 the things that Mr. Merkin did satisfied the standards that
22 then existed with -- or exceeded those standards with regard
23 to each of the five P's.

24 THE COURT: Is that everything that Merkin did in
25 Mr. Weingarten's report?

1 MR. LEVANDER: I don't know the answer to that
2 question, Your Honor. I think that Mr. Weingarten
3 definitely knew things that may not be in that report. But
4 he --

5 THE COURT: But that's the issue that's being
6 raised.

7 MR. LEVANDER: Let me --

8 THE COURT: That -- you know, that he shouldn't be
9 able to supplement his report by coming to trial and
10 expanding it.

11 MR. LEVANDER: -- no. What -- you know, what she
12 complained about, for example, was he said there were lots
13 of managers who did better than Madoff and that the returns
14 were plausible, and therefore when Mr. Merkin believed that,
15 that's consistent with his 40 years and his knowledge. She
16 deposed him on it. Give me some managers. And he gave
17 names of those managers.

18 That's what they're supposed to do. If they
19 didn't like the report, they shouldn't have taken his
20 deposition and waited a year and then said, "Oh, gee, we
21 don't know." And if the standard is the one they've just
22 laid out for you, Mr. Pomerantz testified that he looked at
23 less than 10 of the confirmations out of the thousands of
24 confirmations and he can't remember which ones. So, that's
25 our problem. And then Mr. Pomerantz goes, too. What's good

1 for the goose is good for the gander.

2 But the point here is that what Mr. -- his
3 expertise is, is that it didn't -- you didn't have all these
4 mathematical tests. You actually asked questions consistent
5 with the questionnaire, a document that Mr. Pomerantz relied
6 on that Mr. Weingarten was familiar with, that that has
7 questions. And those questions are tied into the six -- the
8 five P's. And Mr. Merkin assiduously tried to get answers
9 to those five P's. And he did his homework in the way that
10 it was done in those times.

11 Now, you know, the fact that there isn't a -- you
12 know, a mathematical calculation about that but it was, you
13 know, interfaced, but, you know, Mr. Merkin, the testimony
14 will show, brought in lots of sophisticated investors to
15 meet with Madoff and they asked the same kind of questions.
16 They had the same kind of due diligence. And they were
17 sophisticated people, too, people from, you know, the best
18 firms on Wall Street, banks, and you'll hear all about that.

19 It seems to me that Mr. Weingarten's testimony
20 clearly satisfies Rule 26, clearly satisfies 702, and Your
21 Honor has to make a decision as to whether or not you want
22 to hear about all kinds of mathematical charts and the
23 cross-examination on those charts that's not relevant.
24 That's the Pomerantz issue.

25 THE COURT: All right. Thank you.

1 MS. HOANG: Your Honor, if I can just have a few
2 minutes, very quickly. A lot of what Mr. Levander said is -
3 - are disputed facts. Those facts will be before Your Honor
4 whether through Mr. Merkin or through other witnesses in
5 this case, and that's for Your Honor to decide. As to what
6 his -- what he said about the deposition, I could -- I did
7 ask him about the managers and he named off a few, but it's
8 not my duty -- job to further expand on what is in his
9 report or what is not in his report, and Your Honor, I
10 direct your attention to those reports and the documents.
11 Consider there is no managers listed. There's nothing in
12 there. It's not my job to do what he -- they should have
13 done consistent with Rule 702.

14 And then, just to address one last point, they
15 keep ask -- saying that, you know, Mr. -- or that the
16 standards at the time didn't require you to do the
17 quantitative analysis that's set forth, the different types
18 of tools that are set forth in Dr. Pomerantz's report.
19 Well, they did. As -- they did because they were available.
20 You see that from the (indiscernible) document in 1995.

21 In 1996, '97, there were AIMA standards. And the
22 questions in the AIMA standards don't -- excuse me -- don't
23 specifically lay out all of those tools. But as Dr.
24 Pomerantz responded to during his deposition on a pointed
25 question regarding, "well, where is it in the AIMA," he

1 responded that, "Well, it's not identified specifically, but
2 to get to each of those answers to the topics that are
3 raised in there, you have to perform quantitative analysis."

4 It talks about draw-down. You have to perform
5 quantitative analysis based on what you know the returns are
6 on the fund to figure out if -- how much money that the fund
7 was down during particular months. He said -- I mean -- if
8 you -- I'm sorry -- that he goes through the AIMA
9 questionnaire and says, "Yeah, for each of these you have to
10 perform quantitative analysis."

11 So, I don't think it's correct to keep repeating
12 that, well, the AIMA standards -- in 1997 they didn't
13 require you to do quantitative analysis. You see it in the
14 (indiscernible) document in 1995 that was available and that
15 people were doing it, that Mr. Merkin had it in his
16 possession.

17 THE COURT: I reserve decision on this one. I
18 have a serious question about the relevance of virtually all
19 of this due diligence testimony for the reasons I've stated,
20 but I'll consider it in connection with both experts.

21 MR. LEVANDER: Can I have a one-sentence --

22 THE COURT: One sentence.

23 MR. LEVANDER: -- one sentence. How is it
24 possible that he can be qualified as an expert when he says
25 that it's not in the AIMA report and he didn't do it at that

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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Date: August 11, 2016